# REGISTERING TITLE TO LAND.

A SERIES OF LECTURES DELIVERED AT YALE

BY

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TO THE

HONORABLE SIMEON E. BALDWIN,

JUDGE OF THE SUPREME COURT OF ERRORS OF CONNECTICUT,

AND PROFESSOR OF CONSTITUTIONAL LAW IN

YALE UNIVERSITY,

THIS WORK IS RESPECTFULLY DEDICATED.

# PUBLISHERS' NOTE.

The system of registering title, originally introduced in Germany in 1722, and afterwards (1857) independently worked out into practical form by Sir Robert Torrens for South Australia, has been now adopted by three of the United States — Illinois, Ohio and Massachusetts. Some of its features have already become, and others soon must be, the subject of judicial decision in our courts. (See People v. Chase, 165 Ill. 527; State v. Guilbert, 56 Ohio St. 575; People v. Simon, 176 Ill. 165; Tyler v. Judges, — Mass. —, 55 N. E. R. 812.) The purpose of this work is to state the general history of public registration of land titles in other countries, and the merits of this system as compared with that of recording the conveyances under which title may be claimed.

The author has made the subject a special study for years, and the results were summarized in a course of lectures delivered on the William L. Storrs foundation before the Law Department of Yale University, in April, 1900. These are given in this volume substantially in their original form.

Dr. Dumas has also published on this subject a brief article in the *Revue Politique et Parlementaire* for September, 1898, entitled "Le Nouveau Régime de Publicité des Droits Reéls en Angleterre," and other articles on the same subject in the *Revue d' Economic Politique*.

CHICAGO, *August, 1900.*

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# REGISTERING TITLE TO LAND.

## LECTURE I.

### A GENERAL VIEW OF THE SUBJECT OF REGISTRATION.

*Gentlemen:*

My first duty in occupying this chair to-day must be to express my deep gratitude to the corporation of your celebrated University, for appointing me this year as Lecturer according to the William L. Storrs foundation. I must sincerely confess that I feel quite unworthy of the great honor bestowed on me, and at the same time quite unequal to assuming the responsibilities of such an appointment. I beg, therefore, the indulgence of all who shall gather here to attend these lectures; and I plead quite guilty of an imperfect and defective knowledge of your language. We are much too severe in France on foreigners who attempt to speak our tongue, and we only realize when we go abroad ourselves how very difficult it is for us to express correctly an idea in any other than our native tongue.

The subject of my lectures is, as you are already informed —

**Land Registration in Various Countries.**— As you know, registration of title to land is nothing more or less than the entering of titles into public books, with this two-fold object: 1st, that he whose title is registered should have no cause whatever to apprehend ejectment; and 2d, that he alone who is registered as an owner of right should be able to give to a third person title to any part of the same immovable property. The first question to be answered on such a subject is this: Why should land be registered at all? That is to say: Why should *titles* or *deeds* relating to land undergo the formalities of registration, with all the expense and inquiry that registration may require?

This primordial question, which in former times remained unthought of, even among lawyers, has now a more and more considerable place in the minds of every class of people: of all those who may have to deal with land as sellers or as purchasers; as creditors or as debtors; as entitled to real property by legacy or by inheritance; or as having to do with it as members of the legal profession, or simply because of their theoretical interest in problems of legislation. Such a growing interest is not merely accidental. It is owing to the services that registration can render not only

to owners of land, but to all those having rights of mortgage, easement, way or water, or any other servitude on real property. As I have said, the main principle of registration is to make registered titles indefeasible, whereas unregistered titles are open to contest. This principle of indefeasible rights could not but be appreciated as soon as commercial transactions concerning landed property began to be frequent and important. Civil law is very often, in spite of the eternal type of its classical features, subordinate to economical life. It is clear that land registration would have seemed a superfluity in times when social situations and rights were fixed forever, or seemed to be; when the whole extent of usable land was tied up, by settlements or otherwise, so as to form separate estates which were never sold or divided, and which passed after death to the eldest son without any doubt as to the ownership. He who never buys or sells has little care for the best methods of conveyancing. But when the centuries passed and liberty began to shine on the old world; when land, instead of being tied up, was declared free and became the object of the same contracts as movable goods, then those who had rights in it manifested their chief need and desire: that need which is expressed by the single word "security." And as the indefeasible right provided by registration appeared the best condition of security, registration came to the front among desired reforms.

A general view of the subject of registration may be useful before undertaking a detailed examination of different methods of legislation. Speaking from a theoretical standpoint, it may be said that registration is usually framed so as to meet two different purposes — it secures ownership, and it secures priority among creditors. Each of these purposes deserves special consideration. Let us first look at creditors' rights.

**Creditors.**— It is a fact that for a long time a creditor's security was not at all grounded on his debtor's property. Many historical considerations have proved that, in former days, a creditor found a much better guaranty in personal than in real bailments. For instance, in Roman law, we find that collateral promises such as those of "*fide jussores,*" "*fide promissores,*" preceded any institutions of mortgage. It seemed that an agreement to answer for the payment of a debt, or the performance of any other duty, was, in the event of failure by the debtor, a far better guaranty than any right more or less eventual on the debtor's property. To explain such an appearance of anomaly we must allude to the reasons, both psychological and practical, which made such a system preferable.

In the first place it must be remembered that the awe which ancient people had for a simple oath made a man feel quite sure that whosoever

had pledged himself under such a sanction would faithfully keep his promise. Civil law was, at that time, quite subordinate to religious forms; the profession of the law was a part of priesthood, and he who bound his conscience did more than he who bound his property. I am not sure that we of modern times, however proud of our progress we may be, ought not to have some regret for that "keeping to one's word" which characterized the ancients. We must add that the penalties of any false promise were such that no one was likely to bind himself beyond his power to fulfill. The man who did not keep his promise could be taken as a slave by the creditor, and such a threat was of a nature to prevent all rash promises. And as the agreements of that time only had regard to small sums, such as could be recovered by a few months or years of the promisor's labor, the creditor was pretty sure to be paid by that, if the mere threat of slavery did not produce its full effect. Remember, also, that in such times social and family bonds being very strong and close, one was always sure to get a collateral promise from his parents or neighbors. Here, also, was a religious duty which no one overlooked; and it is easy to understand how under such circumstances verbal agreements should have had and kept so great importance.

But besides those reasons which made collateral promises quite reliable, there were others which

prevented creditors' rights from being grounded on landed property. Land was neither alienable nor seizable. It was the joint property of the whole family. No one of the members, not even the chief himself, could say that, to this or that extent, a part of the domain belonged to him.

In ancient Rome the private property, *ager privatus*, was the burial place of the dead, and it would have been a sacrilege to grant any right on it to a stranger. However, we know that as time went by, people understood little by little that property was no less a title to credit than friendship, and that if they asked of a parent or neighbor a collateral promise, it was quite as natural to derive the guaranty from their ability to respond as property owners. But how were they to pledge the land? Here appears the practical meaning of registration. Had the owner of the land been able to grant to his creditor a registered title, this security would have saved him from any other trouble. But as this practical institution had not yet been dreamed of, the owner of land knew that he could only obtain a loan from the creditor by giving away the land itself; and this is exactly what was done in Rome by the old contract of *fiducia*. The creditor became proprietor of the debtor's land, but at the same time obliged himself to give back the land as soon as the debtor should pay the amount of the loan. This was but a moral obligation, and the origin of it can only

be found in the improved habits of the more honest class of men. If the creditor refused to give back the land when he was paid, no civil action could force him to. He had been made proprietor according to law, and remained so as long as he would. But if he did act so meanly, public reprobation was sure to pursue him, and the censor, who was the keeper of the morals of the city, noted him as a man unworthy of any trust. But in the meantime the debtor was deprived of his land, and his situation caused him a double injury. First, he lost not only the property, but also the possession of his land, and could not cultivate and improve it; and second, as he had exhausted, by his loss of possession, the whole credit he could get from it, there remained no practical possibility for him to use the same land as a guaranty for a second loan. Since credit meant possession, and without possession there was no credit, the man who disposed of a large property for a small loan thus lost his right to the remainder of his title of credit.

This case deserves consideration, for it keeps its meaning to this day. It is the logical consequence to which communities are driven which have no system of registration. The creditor who cannot obtain an indefeasible title or priority by registration, necessarily requires possession of the land; and we may say of this subject as of so many others: "Learn from the past."

But let us go on with our reminiscences of Roman law. The lawyers of the old Italian republic were far too wise not to understand the inconveniences I have just pointed out, and skilfully contrived to escape from them. A remedy was found at first in an intelligent practice of the institution called *precarium.*

You know that the *precarium* was a mere right of possession obliging him who withheld a thing to give it up to the true owner as soon as he claimed it. It was clear that the creditor would not run a great risk if, while he remained proprietor of the mortgaged land, he agreed to allow the debtor to keep a mere right of *precarium* on the same property. It would suffice for him, if he thought it useful, to go before a magistrate whenever he wished, who would apply in his favor one of the individual statutes known under the name of *interdictum de precario,* and with such a power in hand he was sure to recover immediately the land if the debtor did not pay him. But, in the meanwhile, the debtor had the benefit of keeping his property by the effect of the *precarium.* He had the joy of dwelling on it, he could cultivate and improve it. It gave him satisfaction to feel that his neighbors did not look upon him as a poor man who, for want of money, had lost possession of his land. This was indeed a remarkable reform, but it did not prevent the principal inconvenience of the preceding system, since it still

deprived the debtor of all means of mortgaging the same property a second or third time. And it has always been true that no system of mortgaging can be called good which does not enable the proprietor to get from his land the whole amount of credit for which the value of the land can answer.

The necessity was then felt of finding a way of proceeding which would leave the debtor the proprietor as well as the possessor of his land, while conveying at the same time to the creditor a special right of priority in the same thing. In those early times analysis of abstract principles was already subtile enough for the lawyers to be able to devise a second method of progress. They already knew that one can have, without being either proprietor or possessor, certain definite rights on another man's land. They knew about easements and servitudes, which confer upon any citizen legal rights in his neighbor's property. This example could lead them to a legal notion of a mortgagee's rights. But it was not one of those abstract considerations which enforced at that time the progress of Roman law. An example was taken from a practice already existing between country landlords and their farmers. It was admitted that, when the farm rent was not paid, the Roman landlord could pay himself by seizing a part of the farmer's goods; for instance, his cattle. "Well," said the lawyer to the creditor, "Do

just the same to your debtor as to your farmers — agree that if you are not paid at the date of payment you will seize the debtor's goods." A special action called *serviana actio* sanctioned the farmer's duties and responsibilities; and a similar action called *quasi serviana actio* came to sanction the debtor's obligations. This action served to obtain the *jus possidendi*, by which the creditor prevented all further wasting of the debtor's goods; and then the *jus distrahendi*, by which, if the debtor did not pay him so as to get back possession, the creditor could sell the mortgaged property. All those among you who are familiar with English law will have noticed the likeness between this old Roman custom and the English practice called "distress for rent," according to which the landlord, if not paid by the farmer, can seize whatever is found on the land.

Such a way of proceeding had allowed the debtor to get as many creditors as he could, and in that sense the economical requirements were satisfied. But at the same time this very progress of Roman law showed that registration could not be had without ranking creditors according to the date and priority of their agreement with the debtor; but if the accuracy of the date could be proved by word or by writing, the priority itself of each creditor remained a secret from the others, and no one knew, when making a loan with a covenant for mortgage, whether rights

prior to his own had not already been agreed upon. This secrecy was a cause of dispute as well as of confusion. Each creditor could sue upon his claim to obtain the *jus possidendi;* and if he did not happen to be first in rank, any previous creditor could oppose to his action the exception whose formula is known to be, "*si non sibi res ante fuerit obligata.*"

We must add that, to complete the confusion, some among the creditors were privileged; that is to say, were deemed to be preferred to all previous rights. Such was the condition, for instance, of liens established by law. A married woman always came first for the payment of her matrimonial portion, and the public treasury had in like manner special rights.

The Roman Empire did not last long enough for the Roman lawyers to themselves correct the inconveniences that have just been stated. And as evil does not always bear its remedy within itself, the reform did not work itself out very rapidly in those countries where, after the decline of the empire, the Roman law was maintained. The best example of the survival of Roman law is that of France, or at least part of France, throughout the medieval age, and even during the later centuries up to 1789, when, as the result of the great Revolution, a new system was enacted, as will be shown in our fourth lecture. It is familiar to all law students that before the great revo-

lution France had not *one* single system of legislation, but was divided by south and north — the northern provinces having no other rule than custom, with great differences between one province and another, and the southern provinces remaining bound to Roman law, as if they were still under the rule of Rome. In all these southern provinces secrecy of mortgages survived as a principle; but in the northern provinces mortgages were subject to registration, and had no effect as regards third persons, unless registered by order of a magistrate. Under Louis XIV., in 1673, the prime minister, Colbert, induced the king to sign an edict according to which registration was made general throughout the whole country. But this reform displeased the aristocratic families, who did not care to see the incumbrances weighing on their properties completely disclosed, so that before one year had elapsed the beneficial edict of 1673 was repealed. And for two centuries more the principle of secrecy was preserved with all its inconveniences.

**Ownership.**— But it was not only in the matter of real securities that registration had to prove its usefulness. The title of the owner bimself receives no less benefit from registration than that of a creditor. It is easy to understand that if a proprietor is allowed, where his title is registered, to oppose any claim arising from a third person pre-

tending to be entitled to the same ownership, this simple fact will give to landed property the most solid basis that can be conceived. Two special benefits of such a principle deserve consideration.

(A) In the first place, the registered proprietor will no longer have reason to fear that he may be evicted because his vendor had, unknown to him, already sold the land to a third person. It is sufficient for him to ascertain that there has been no registration previous to his, and, if so, he has nothing to fear from any one whose rights have been kept secret.

(B) In the second place, the registered proprietor may feel himself protected against any defect in his vendor's title. It is not a common case for a vendor to sell property in which he never had any right at all. But it frequently occurs that a vendor is ignorant of some capital defect in his ownership. He may have been a victim of deceit, error or fraud; he may have purchased the property from an insane man, or from a minor without his guardian's legal assistance, or from a married woman deprived of any right to sell without her husband's consent. In all these cases the defect may be unknown when the property is sold for the second time; but by the effect of registration, this last purchaser can be sure that his own right can suffer no prejudice from any litigation between the vendor and other persons.

However clear these consequences of the prin-

ciple of registration may appear now, they were not understood for a long time. Registration is a modern institution. In primitive societies, land being inalienable owing to communistic institutions, there was no need of protecting deeds of sale. And when transactions concerning land became feasible, deeds of sale were accompanied by such an amount of formalism, and so many witnesses were required, that there was not much risk of any cause of ejectment remaining unnoticed. Yet as far back as the Roman empire, registration of deeds appears to have been felt useful, and to have been started under the shape of an institution named "*insinuatio.*" This consisted in the reading of the contract (*recitatio, professio,* say the Roman laws) before any public authority having the right of authenticating deeds (*jus acta confíciendi*). This authority kept a complete copy of the contract in his books, and the name of *insinuatio* finds its etymology, as well as its meaning, in this duty of copying the deed. *Insinuatio* was made obligatory by the Emperor Constantius Chlorus, and his son, the famous Constantine, enforced the obligation by additional rules. It is believed by Romanists that the main object of this institution was much less to procure security than to prevent deeds of donation, and these deeds alone, from escaping, by the effect of secrecy, the provisions of the well-known *lex cincia,* which prohibited most donations, unless the grants

should be in favor of certain *exceptæ personæ.* The fact is that subsequent laws, instead of making *insinuatio* general, as would have been the case if its object had been security of title, restrained its application. The Emperors Theodore II. and Valentinian III. exonerated all donations *ante nuptias* from *insinuatio* when not exceeding two hundred pieces of gold. Justinian extended the same allowance to any kind of donation beneath five hundred pieces of gold, and provided that no *insinuatio* at all should be required for grants made in favor of matrimonial establishments or freedom of slaves. So, by that time, registration had come to be nothing more than a kind of barrier preventing exaggerated donations. But such are the merits and uses of registration that it survived throughout the medieval centuries and up to the French Revolution, and was embodied in the Civil Code with a new meaning, concerning which it will be necessary to give some details in one of my next lectures.

At the close of this nineteenth century, all civilized nations are coming to registration of title to land, because immovable property is becoming more and more a matter of commercial dealing, and there can be no trade without security. Just as shareholders in every business require to be entered in the manager's office as nominative partners in the joint undertaking, so land-owners know it to be necessary for them to have

nominative rights, proved by public writings and against which there can be no claim. Security can no more, as in the feudal times, depend on private force. When land was a sign of nobility, and nobility meant unquestionable power of defending one's ownership by war, landlords were indeed the lords of the land, and put more trust for their protection in their retainers than in any document they would have been too ignorant to read or understand. But time has sped on. The unity of each state requires that its citizens should not rely on physical force to settle their claims. No other protection than legal protection can be available; and that is why such moral strength is being acquired by this principle that ownership belongs to him who, after inquiry, has been declared by public authority the proper person to be registered as land-owner. It depends on him who claims ownership to have it registered, after satisfying the inquiry. So much the worse for those who neglect such means and allow themselves, by mere carelessness, to be registered out of their property by a stranger.

It is to be observed that modern nations, though they all contrive to reach the same point, are not yet equally near to it. For a nation to be able to boast of a complete system of registration, extending to the whole area of the country, it is not enough that there should be registers confirming an absolute right to owners entered in them. It

is necessary that every owner should be entered; and this result can only be obtained if registration is compulsory, and if, that the principle of compulsion may not be objectionable, compensation is provided for mistakes caused by registration.

We would therefore say that registration is qualified by three essential features:

(*a*) The grant of an absolute title.

(*b*) Compulsion.

(*c*) Compensation for errors.

These three features are, at the present time, to be found only in Germany and Austria, in some parts of Switzerland, in the Australian colonies, in the greater part of Canada, and in the small regency of Tunis on the north coast of Africa. However, it must be observed that one or another of them, especially that of compulsion, is the subject of more or less exception in some of the above countries.

It must not be understood that in all other countries there is no registration at all. Many other nations have a system of registration, which, though it may be very imperfect, still is of some use, and is a step on the path of daily progress. This imperfect system can be called registration of deeds, as opposed to the preceding one, which may be called registration of title. Where deeds alone are registered, the owners entered on them are not entitled to say that they have an indefeasible right. They are only allowed to claim a

right of priority against any third party whose right has not been made public before their own. In spite of registration they remain exposed to the consequences of any defect which may be found in their title. The deeds being simply made public, without any inquiry as to their accuracy, the registered owner is only assured that, if valid, his title will stand preferable to any other; but if it be not valid, it will acquire no validity by the fact of registration. This second system is that of France, England, Scotland, Ireland, Belgium, Italy, Spain, part of Switzerland, the republics of South America, and I may add, as you know, of your own great republic.

Before we enter upon any detailed examination of these different systems, I will only venture to mention for those among you who may be interested in this subject, some of the books where further knowledge may be acquired.

One of the first, and up to this day one of the best, is a little pamphlet written for the Cobden Club by Sir Robert Torrens, who, as you know, was the first to substitute, in the Australian colonies, registration of title for registration of deeds. This pamphlet bears the title: "An essay on the transfer of land by registration." The Cobden Club has also issued a compendious volume under the title: "System of land tenure in various countries," full of interesting information concerning different nations.

Among other English authors I will name Mr. Dill, who wrote in 1893 an "Essay on transfer of land by registration of title;" Mr. Morris, whose book on "Land and mortgage registration" appeared in 1895; and especially Mr. Ch. Fortescue Brickdale, now assistant registrar in London, who, indeed, has taken a most effective part in the framing of the English system. His successive books or pamphlets are the following: "Registration of title to land" (1886), "Registration of title in Prussia" (1888), "The practice of land registry" (1891), "Registration in Middlesex" (1892), "Notes on land transfer in various countries" (1894), "Report on the system of registration of title now in operation in Germany and Austria-Hungary" (1897), and a still larger book on the new English system, published the present year.

As to Ireland I would point out Mr. Madden's book on "Land transfer and registration of title in Ireland" (1892). Other valuable books on English land laws deserve to be mentioned, but they are rather out of the special line of registration of title, so that, in spite of my regard for them, I do not give them.

Among the French books, far the best one would be, I dare say, that of Emmanuel Besson, bearing the title of "Les livres fonciers," published in 1892. Thoughtful suggestions are to be found in various articles on the same subject published,

during the past thirty years, by the Société de legislation comparée, in its special monthly bulletin. Very good literature is also that of the papers read in 1889 and in 1892 before the Paris Real Property congresses. I may, perhaps, be allowed to add that I have myself written a good deal on this subject.

## LECTURE II.

### COUNTRIES WHERE REGISTRATION IS CARRIED OUT IN A COMPLETE WAY.

We have said in our last lecture that there are no more than five or six countries where transfers and other dealings relating to land are conducted under a logical method of conveyancing by registration; that is to say, where registration meets its purpose by being both compulsory and indefeasible. We will examine to-day the systems of the most important of these—Australia, Germany, and Austria-Hungary. In our fifth lecture we will speak of the minor states where registration of title is absolute, such as the regency of Tunis, Canada, and the canton of Vand.

Australia deserves to be mentioned first as having been the birthplace of the Torrens system, and this system cannot be better defined than by the words of its originator, Sir Robert Torrens, who wrote as follows: "The person or persons in whom singly or collectively the fee-simple is vested, either at law or in equity, may apply to have the land placed on the register of titles. The applications are submitted for examination to a barrister and to a conveyancer, who are styled

'examiners of titles.' These gentlemen report to the registrar: 1st. Whether the description of land is definite and clear. 2d. Is the applicant in undisputed possession of the property? 3d. Does he appear in equity and justice rightfully entitled thereto? 4th. Does he produce such evidence of title as leads to the conclusion that no other person is in position to succeed against him in an action for ejectment."

When the report of the examiners of titles is received the registrar may, according to the case, choose from three determinations: He may reject the application when it has not been found satisfactory; he may register the title at once if the applicant has fully satisfied the examiners; or he may postpone registration for a time until better information is gathered. In this case notices are served upon any person likely to be interested, and also upon occupiers of contiguous properties, and, according to the result of this inquiry, registration may be granted as soon as evidence of title is produced.

The technical mechanism of registration is most simple. It consists of the issue of a certificate setting forth the nature of the estate of the applicant, and this certificate of title is sufficient to vest the estate indefeasibly in the applicant.

A duplicate of every certificate of title is kept by the registrar, and the register is nothing more than the binding together of these duplicates.

When the certificates have been issued the registered owner enjoys two special benefits:

1. As his title is declared to be indefeasible, no one can raise any adverse claim against it. If in fact it were proved that he was not, before the registration, entitled to make an application for a certificate, the rightful owner nevertheless remains deprived of any means of recovering the land. But for the sake of justice a money payment is made to him out of a compensation fund. The compensation fund is raised by a contribution of one-half pence in the pound sterling — say one-fifth of one per cent., — and this contribution is levied upon the value of the land when first brought under the operation of the Torrens act. This fund has been found more than sufficient to meet the very few claims caused by errors. I do not think such a system can be charged with causing the exclusion of the rightful owner from his property, for, if you will remember that an applicant is registered only when he is in occupation, the rightful owner is never turned out from what he actually possesses; he receives compensation in lieu of a property he was not caring for when the indefeasible title was vested in the applicant.

2d. The second benefit can be defined as "the greatest facility for any future dealing with the registered land." Suppose it is sold; this is the most simple of dealings. It is only necessary that a fresh certificate of title bearing the purchaser's

name should be made out by the registrar, who cancels the transferrer's certificate. This can be done in a few minutes without any great expense, and requires none of the legal assistance which, in other countries, consumes so much time and money. If the holder transfers part only of the fee, notice of this partial transfer need only be stamped on the transferrer's certificate. If the transferrer prefers that the memorandum of the sale be not stamped on his title, he is allowed to take out a fresh certificate, and in that case the transferee gets another title of his own for the portion he has acquired. It is permitted in any case to separate a certificate into two or more, or to combine several certificates into one, where several freeholds are acquired by a single owner. As to mortgages and leases, they are stamped on the title and canceled after payment as any other cause of surrender, and, in the meantime, the indorsement notifies any one who wishes to know the charges on an estate, before making a loan to the holder. As to equitable mortgages, the creditor proceeds by lodging a *caveat* in the registry. This notice involves the prohibition to register any dealing with the land during the period of the loan. At any moment the creditor may turn his equitable mortgage into a registered charge. Provisions of the same kind enable direct settlements and entails to be created.

All this legal work is rapid and cheap. The ap-

plication fee is no more than 5*s.*, and the cost of a land certificate is £1. For a freehold once registered, future dealings only involve a fee of 5*s.* in the cheapest colonies and £1 in the most expensive ones. When examination of title is necessary, the cost varies with the value of the property concerned; but this *ad valorem* cost is moderate and never rises above one-third of one per cent.

The general working of the system is most satisfactory, and though compulsion applies only to land granted by the crown since the system was established, most holders have come under its operation. Very few exceptions can be found in Queensland; and in other countries where the greater part of crown grants preceded the establishment of the system, alienated land has been, to a great extent, voluntarily registered since then.

These advantages were, at first, only experienced in South Australia, where the first "Real Property Act" was passed in 1857, being introduced, as you know, by Sir Robert Torrens, who had drafted it. In 1861 the system was introduced in Queensland, Tasmania and Victoria, and in 1862 in New South Wales. A few years later, in 1870, it was adopted in New Zealand, and in 1874 by Western Australia; spreading since that date over the whole of the British Australian colonies.

**German-speaking States.** — Among German-speaking states Prussia holds the foremost rank

in respect to registration of title to land. Two dates deserve to be remembered as those when registration made its first and its final step in this state — 1722 and 1872. The first was that of the establishment by Frederick William I. of a system of district registries of mortgages. The second was that of the conversion of those registries which formerly only gave evidence of the deeds into registries giving evidence of title.

Since this last law of 1872 — or rather since these last laws, as four acts on the same subject were passed at one time — the Prussian system has been like that in Australia, a system of compulsory and indefeasible title. But Prussia is not the only German state where registration is practiced. In Baden the system dates from 1809; in Saxony it has existed since 1843. Hesse has also had a similar system for a long period. As to the minor states, the dates of the adoption of registration by them are given as the following in M. Morris' recent book on "Land and Registration:"

| | | | |
|---|---|---|---|
| Sondershausen | 1850 | Cobourg Gotha | 1877 |
| Altenburg | 1852 | Anhalt | 1877 |
| The towns of the two Mecklenburg | 1857 | Brunswick | 1878 |
| Reuss (younger branch) | 1858 | Lubeck (amended) | 1879 |
| Meiningen | 1862 | Waldeck | 1881 |
| Reuss (elder branch) | 1873 | Lippe Detmold | 1882 |
| Oldenburg | 1876 | Schaumburg Lippe | 1884 |
| | | Alsace Lorraine | 1891 |

It must be added that, in two other German states (Bavaria and Wurtemberg), registration of mortgages is kept in a very similar way, though

registration of title does not exist. But, as to antiquity, Austria-Hungary stands before the states belonging to the German Empire. In Bohemia registration dates from the twelfth century. The Austrian Civil Code, enacted in 1811, provided that in those states where registration already existed, indefeasible titles should continue to be conferred so far at least as third persons were concerned. This did not, however, bring uniformity to Austrian legislation. But in 1871, an act passed on the 25th of July established a uniform system for *all* the states where registration already existed, and provided that the other states might adopt the same system if they chose. This was optional compulsion, like that practiced under the new transfer act in England. Only, whereas in England it is each county council's business to decide whether registration shall be compulsory or not in its area, in Austria it is the parliament of each confederated state which has to vote on the same subject. In fact, excepting Tyrol, all the Austrian states have accepted the system. In Hungary registration of title dates from 1855, when a decree, still in force, was passed during the temporary Austrian dominion. But in all these states the mechanism of the system is in many respects different from that of Australia.

1st. First, it must be noticed that the power of vesting an estate indefeasibly in an applicant is

not, as in Australia, conferred upon a single registrar, sometimes assisted by one or two examiners of titles. The power of investment belongs to a magistrate chosen, for each registry, from among the members of the district tribunal. This magistrate must ascertain the applicant's rights, and examine for that purpose the following points: Is the applicant favored with legal capacity and right to acquire? Is the land alienable? Is the transferee capable of selling the property? Subject to these conditions the conveyance is effected by two oral declarations made at the same time before the magistrate. The registered owner declares that he sells the land to the transferee, and the transferee declares that he applies for registration. As soon as it is registered the owner's title becomes conclusive, and cannot even be affected by adverse occupation (art. 6). Any further creation of a charge or mortgage is registered as in the Australian system, in the same way as a transfer. But it must be noticed that no registration is required for general rights of pre-emption, nor for easements and servitudes (this is certainly a deficiency in the Prussian system), nor for leases and tenancies, nor for certain rights of entry and user for mining purposes. The exception of leases and tenancies arises, in great part, from the fact that, under the influence of Roman law, most of the European legislatures have been led to consider that a lease does not

confer a real right in land, but only a personal right against the lessor. It must be added that the registration of easements and servitudes is required in Austria-Hungary.

2d. Another difference from the Australian system is that in Prussia, whenever registration has been obtained by fraud, error or compulsion, or when one of the parties is incapacitated, rectification can be obtained. This is subject, however, to the rights of third parties, when acquired for value and in good faith in reliance on the correctness of the register.

3d. A third difference to be noticed is that, whereas in the Australian system the registers are public, the principle of secrecy prevails in the German states. Baden is the only one where the registers are not absolutely private. In Austria and Hungary any one is likewise free to search the records.

4th. A fourth difference concerns occupation. We have already remarked that under the Prussian as well as under the Australian system, possession cannot serve as a title against a registered ownership. This exists also in the English system (section 21 of the English land transfer act of 1875). But occupation is maintained in Austria, where the old Roman theory of *usucapio* has been kept up. According to this theory, any possessor, after the time for acquiring property by occupation has passed, may avail himself of his posses-

sion by requiring his rights as occupier to be entered in the register. In such a case the registered owner, in spite of registration, is completely registered out of his property. (The Austrian Civil Code, secs. 1457 to 1500, and Law of 1871, secs. 70 and 71.) According to section 1468, occupation must have been continued for thirty years before it confers a right of property on a registered occupier. Occupation also has its effect in the case of one who has obtained registration in spite of some defect in his title. Such an one need only occupy the land three years more for his title to be completed by possession. As in Roman law, occupation, to be lawful, needs to have a legal beginning, such as gift, loan or purchase; to be *bona fide*, and to be of right (*nec vi, nec clam, nec precario*). Secs. 1461, 1463, 1464. On the other hand, it must be noticed that whereas the Austrian acts maintain occupation and its effect even against the registered owner, the Saxony system abolishes occupation in a complete way, even against an owner having neglected to seek the protection of registration. (Civil Code of 1863, sec. 279.)

5th. A fifth difference is to be found in the absence of a compensation fund to provide for accidental errors. This has not seemed to be needed in the German system, as it is in the Australian, and for these reasons: In the first place, rectification of errors may be obtained in the German system, as we have already seen, except when

registration would cause any injury to a *bona fide* purchaser for value. And, in the second place, errors were expected to be — and in fact have been — immaterial in Germany, where the origin of property was thoroughly known everywhere, and where, it must be added, registration is not conducted by a mere recorder of titles, as in Australia, but is submitted to the approval of a magistrate.

Moreover, it may be said that errors are or would be ultimately compensated for by the state, throughout all the German system, and the liability of the person, private or official, who caused the mistake is also certain. (See Land Register Ordinance of 5th of May, 1872, part II, secs. 20–29, amended by law of 24th of April, 1878.)

6th. We now reach a sixth difference, due to the connection of the land registry with the *cadaster*, under the German system.

We know that the *cadaster* is nothing more than a land-tax register, but as, in consideration of an equitable establishment of the land-tax, the assessed parcels of land must be determined as exactly as possible, it has been deemed convenient in most countries to describe the properties, when put on the register, according to the boundaries they appear to have on the *cadaster*. This relationship is by no means a necessary one, and we have seen that in Australia the physical description of land is only derived from the plans

that applicants must produce before obtaining registration. But in the German states, as well as in Austria-Hungary, where the *cadaster* plans are accurate and kept up to date, the land-registry officers, instead of requiring private mapping, simply refer to the *cadaster* descriptions, of which every parcel has its number. This reference is more or less complete, according to the peculiar registration of each state. In Prussia it is necessary that the land register should relate all the particulars of the *cadaster* as to area, value, quality, etc.; whereas in Austria it only gives the number of the parcel; and those who want to ascertain the economical condition of the property are easily led by this simple reference to a copy of the *cadastral* map, which is kept in the land registry. On account of this double use of the *cadaster*, it is essential that its accuracy should be under continual control. Periodical revisions are therefore established, and take place every ten or fifteen years, according to the place. The books which accompany the *cadastral* plans, to show the owner and state of cultivation, are likewise kept up to date. These *cadastral* plans not only show the physical features of the land, but are specially made to show the boundaries of each property, as defined by the owner's title, and these boundaries, which may consist in a mere abstract line, only occasionally coincide with physical features.

Having thus determined the points in which, in spite of their great analogy, the Australian and German systems of registration differ, it may be interesting to see how the German system has been enforced in the Rhine provinces, where it was suddenly made compulsory after the German annexation. Before this political event,—painful as you know to the feelings of all Frenchmen, including myself,—the Rhine provinces were subject to the French system of land transfer, such as we shall describe it. That is to say, mortgage registers and the land-tax *cadaster* were the only evidence of ownership in land, and a very incomplete evidence, as you know.

The first step of the German reform was to declare, by an act of 1885, that all transfers should be made before a public notary. This advance, similar to the provisions of the Belgian law, secured, if not a better proof of titles, at least a complete preservation of them, since all transfers made before the public notary are kept in their original form in his office. And as the notary would be liable for neglecting to have the contract transcribed in the office of the keeper of mortgages, the same reform prevented any transfers remaining secret, as they did when transfers could be effected under private seal.

But if this reform made titles public—at least *inter vivos* titles, for all devolutions by inheritance or by legacy kept out of reach—it did not make

the titles absolute, which was the aim of the German government.

It was necessary to pass a new local act enacted on the 22d of June, 1891, in order to secure formation of land registries involving indefeasible rights for the registered owners.

The public authority relied upon for the examination of applications is the local tribunal of first instance (*Amtsgericht*). It would have seemed rather rash to oblige the provinces to accept a single magistrate's determination, as they had always been accustomed to having their lawsuits settled by the magistrates, at least. Where an order has been given by the ministry of justice in Berlin that registration shall be begun in an *Amtsgericht* district, notice is sent to all the district occupiers requiring them to appear before the tribunal and produce:

1st. An extract from the *cadaster* office showing the parcels they are believed to own in any particular township.

2d. All their personal documents serving as proofs of their claim.

On the appointed day each applicant is cross-examined by the tribunal, and a statement is drawn up of his declarations. This statement contains:

(*a*) The name of the applicant's predecessor.

(*b*) The legal nature of the last transfer concerning the land (sale, grant, legacy, inheritance, auction, contract, etc.).

(*c*) A reference to any document produced by the applicant.

(*d*) A list of mortgages charged upon the land.

A copy of this statement is sent to the mayor of the township where the parcels claimed are situated, as well as to the keeper of mortgages, who must both give advice of their personal belief concerning the accuracy of the claim. Notice is also sent to all the known incumbrancers. Each case in a township is dealt with in the same way, and as soon as information is collected as to all the cases in a township, notice is sent to the president of the court of appeal, on which all the local tribunals are dependent, and which for the Rhine provinces sits in Cologne. The president of the court of appeal obtains from the minister of justice a rescript fixing a preclusive term of six months for objections, if any, to be produced, and possible opponents are warned of the proceeding by advertisements in the local papers requesting them to send in their claims. As soon as the six months have elapsed the registers are engrossed according to the claims received. After this engrossment is accomplished there is still a final delay of eleven days for actions to be commenced by opponents before the registers come into operation. This procedure has proved satisfactory. A few mistakes, but no cases of intentional fraud, have been observed.

The main conclusion to be drawn from this ex-

ample of the Rhine provinces is that registration was applicable in a land where the French system had previously worked out its whole effect; and no experience could be better calculated to convince French lawyers that in France, as well as in every other country, the same reform could be adopted. We shall see in our fourth lecture that the scheme proposed to establish registration of title in France has a close connection with that which has succeeded so well in Alsace Lorraine.

## LECTURE III.

### THE ENGLISH SYSTEM OF REGISTRATION.

It has often been said that the whole of English law was anomaly, and, if I dare utter such an opinion, it is because Englishmen themselves agree to it. English legislation is made out of local customs and particular statutes which have never been codified, so that there is no lack of confusion about them. On the same subject there may be two principal laws to rely upon, and one of them may be of the twelfth century, while the other is of the last year. Scarcely different is the case of land transfer, and we must be prepared to meet with surprises as we attempt to study its rules.

It is a familiar thing to you that landed property has kept, up to this century, certain of the feudal characteristics of the past. Besides the freehold estates requiring no kind of seizin when acquired by sale or inheritance, there still remain copyhold tenures, which can only be transferred with the agreement of the lord of the manor. These two kinds of property remain on a different footing as regards registration. We may be very brief as to copyholds, for they are dying

away. Since the middle of this century copyhold enfranchisement has been an article on the programme of liberal politicians. It is easy to understand why. The lord of the manor having a right to personal duties at each transfer, the owner never knew whether he would not be ruined out of the estate in a mere spirit of vexation on the part of the lord. If this lord was an old man who had made up his mind to troublesome settlements, and should contract with another old man as tenant for life, and with a third old man as tenant in tail, it might happen that the owner of the copyhold would be obliged to pay the private duties of succession several times. Besides this pecuniary inconvenience, copyholds had many others. The copyhold confers a durable right, but as this right is subject to the payment of a rent, this rent is as durable as the right itself, and weighs as a perpetual charge on the property. Moreover, the copyholder is limited in his possession by various other incumbrances, such as prohibition of digging wells or mines, or subjection to all kinds of servitude. The object of the liberals, therefore, has been to enfranchise copyholds by allowing the copyholder to redeem the incumbrances by the payment of a definite sum to the lord of the manor. Statutes with that object were passed in 1841, 1852 (15 and 16 Vict., c. 51), and 1887 (50 and 51 Vict., c. 73). Official commissioners, forming the board of copyhold and

tithe commissioners, were appointed by those acts to estimate the amount of money representing the capital value of the rent and other incumbrances weighing on each copyhold whose redemption was sought. These statutory measures have led to the enfranchisement of as many as three hundred copyholds per annum. There still remain many. New ones are even now and then created. But copyholds are gradually passing away before the salutary invasion of freehold property.

Though this reform is of great economical and social interest, inasmuch as it realizes freedom of land, it has brought some special inconveniences into methods of conveyancing. Copyholds were up to these last years the only property which escaped the unfavorable secrecy which was the rule in British transfers of land. This was the beneficial effect of feudal survival. A copyhold requiring a regular investiture from the lord of the manor could not be secretly bought and sold as a simple freehold. The lord of the manor, wishing to preserve his rights, invested the copyholder by entering his name in his books, and a formality known by the name of "surrender and admittance" then took place. The vendor being deemed to surrender the copyhold to which the purchaser was admitted, symbolized his resignation by giving to the lord, or more commonly to the lord's steward, a branch or leaf out of the estate, and

this same object was at once presented to the purchaser as a proof of his investiture. It is said that, fiction being reduced to its most simple form, the copyholder is never presented with anything more than a pencil taken up from the steward's desk. But the important thing to notice is the fact of the purchaser's name being immediately entered in the lord's books. Here is the true and efficacious formality. It suffices to prevent the vendor from selling the same property several times consecutively to different persons who all, except one, must be ejected. As this guaranty is the main object of registration, its disappearance with the copyhold would have been a matter of regret, if fortunately freeholds were not gradually coming under the rule of publicity which formerly was characteristic only of copyholds.

It must be explained how, for so long a time, such a practical people as the English could allow the complete secrecy of all transactions relating to freeholds. One must not judge too severely land laws which seem most strange before perfectly understanding the reasons for their insufficiency.

I have tried to discover those reasons in this case, and the following is the result of my investigation:

1. In the first place, one excellent reason why secrecy of transfer should be of little importance was the fact of the very few sales of land which oc-

curred in England. This was owing partly to the small number of freeholds existing in a country where land has been monopolized by the aristocracy. In France it is believed that there are nearly eight hundred thousand sales of land per annum. But in England the landed proprietors are no more than two hundred thousand, according to the estimate made in 1871 in the New Domesday book. So that it would be necessary for each English proprietor to sell his estate four times in a year for the inconvenience of secrecy of sale to be felt in England as strongly as in France. And not only has such not been the case, but it is a fact that the few English proprietors contract concerning land much less frequently than continental proprietors. There are the best reasons for this, in the fact that most of the English freeholds are inalienable by virtue of remote agreements. No custom is more persistent than that of tying up land by settlements. In some cases the owner cannot sell the land at all; this occurs when he has only an estate for life. In other cases the owner has an estate tail, and then he may confer some of his rights, or all of them, on the heirs of his body, but he cannot contract with any one else. All these intricacies not only made registration nearly useless because of the few contracts relating to land; they also made it of no account as being, in any case, a slighter guarantee of inalienability.

2. A second reason for registration being superfluous in England proceeded from the absence of a regular system of real securities founded on land. I will explain in my fourth lecture the legal features of *hypotheques* as practiced in France. Such a kind of security does not exist in England, and as its existence would have made registration indispensable, one cannot say whether the absence of registration has been the cause of the absence of *hypotheques*, or the absence of *hypotheques* has been the cause of the absence of registration. It is certain that now that registration is established, as we shall soon see, there is no good reason why *hypotheques* should not be introduced in England. When a debtor has been obliged to give a real security to his creditor, his only resource till now has been to give a mortgage. By this covenant the creditor becomes proprietor of such an extent of land as is agreed upon, and it becomes for him a true estate in fee simple, at least in law if not in equity. The debtor has only a right of redemption when he offers the money secured by the granted property. It is easy to understand that with such a system, hardly, if at all, better than that of ancient Rome, the services of registration should not be appreciated. As *one* creditor only can be guaranteed, he cares very little about a system intended to preserve priority among several creditors; and as that single creditor is in possession, or can at least, by

an action of ejectment, get possession as soon as needed, he has no fear of the debtor mortgaging a property already mortgaged to some one else.

3. To these reasons, so very unfavorable to registration, I must add another, not the least perhaps, which may be found in the way the legal profession opposed any progress of English law in the direction of registration. People whose only work and living were furnished by conveyancing, and who already found alienable estates to be very few, dreaded exceedingly the very idea of a reform which might make the transfer of land rapid, easy and inexpensive. Their obstruction must be held responsible for the backwardness of legislation on this subject.

In spite of all these difficulties it was necessary that a time should come when registration would win its victory. New events prepared its way. First it should be observed that a gradual work has been going on to convert the old inalienable tenures into estates in fee simple, free from all incumbrances. We have already mentioned the redemption of copyholds. We must also mention a series of settled land acts whose aim has been to render alienable, under certain conditions, many of the tied-up estates. Moreover, it should be said that small estates, which are those which change hands most frequently, have become more and more numerous of late. The allotment acts have caused the establishment of many small

holdings cut out from the commons by county councils or by the sanitary authorities, and some great landlords, urged by the agricultural crisis, have divided their large domains into smaller pieces, which could be sold at a better price.

All this made the advantage of registration most desirable. The tenants of small holdings could not afford to pay the bills of conveyancers, and the owners of large estates began to appreciate registration from the time that falling prices, caused by the agricultural crisis, made money matters touch them closely. At the same time English legislators, who would never have been convinced by the examination of the continental systems, were impressed by the example of English colonies; and the success attained in Australia and other British possessions by the Torrens Act made the people believe that, without any lack of patriotism, those same principles could be adopted and acclimated on English soil.

Three different laws have striven to obtain such a result: the Westbury Act, in 1862 (25 and 26 Vict., ch. 53); Lord Cairns' Act, in 1875 (38 and 39 Vict., ch. 87), and the Land Transfer Act of 1897, which came into operation on the 1st of January, 1898 (60 and 61 Vict., ch. 65). This last act alone has worked its way to full success.

In 1830, for the first time, the real property commissioners concluded that a general system of registration would be a desirable thing. But this

conclusion had no effect, and all the bills proposed with it were rejected. This was the fate of Sir John Campbell's bill in 1835, and of a government bill in 1853. When the Westbury act was at last passed in 1862, it hardly fulfilled its purpose, since its only principle was to allow—note this word "allow," which includes no kind of obligation, moral or legal—proprietors to have their title registered. The application was to mention whether an indefeasible title or one not indefeasible was sought. In the first case, great complication of time and inquiry ensued, and in both cases the expense and procedure were out of proportion to the benefit obtained. It must be noticed that all the expense and trouble undergone were unavoidable for those who applied for registration, whereas the benefit derived from the ease with which the owner could sell the registered property to another purchaser remained merely eventual. The result was that no more than thirty-two applications a year were received at the Land Registry. After a few years of this discouraging practice a new effort was made which led to Lord Cairns' transfer act in 1875. This time matters of procedure and expense were considerably simplified. It was no longer necessary, in order to obtain a possessory title—that is to say, one not indefeasible,—to produce a title drawn up by a solicitor whose fees had previously to be added to those of the registry. It was declared to be sufficient that the owner should state the simple fact that he was in possession,

without any attempt to prove his right of property. He was entered on this simple declaration as the registered possessor, and this registration gave him a priority he could oppose to any one who might claim a right derived from a title more recent than his registration. Moreover, the legal aid of limitation transformed his possessory title, after the required lapse of time, into a qualified one. So that no one had any longer a very strong interest to apply for an indefeasible title. Those who knew their rights were beyond dispute and who only cared to enjoy the benefit of the law, asked to be registered merely with a possessory title, and they were then able to profit by the reduced rates of the registry for any future transactions concerning their property. In the meantime, even before they could avail themselves of the effects of limitation, they were permitted, whenever they chose, on the simple proof of their right, to ask that their possessory title be changed into an absolute one, and such a change became all the easier and less expensive the longer the possessory title had been registered. The economy of cost for contracts made under Lord Cairns' act is sufficiently shown by the following figures:

| *Value of the Transaction.* | *Cost if Conducted by a Solicitor.* | *Cost Under Lord W. Act.* | *Cost Under Lord Cairns' Act.* |
|---|---|---|---|
| 50£ | 3£ | 6s. 6d. | 5s. |
| 100£ | 3£ | 12s. | 10s. |
| 200£ | 5£ | 19s. | 15s. |
| 400£ | 6£ | 1£ 5s. | 1£ |
| 1000£ | 10£ | 3£ 15s. | 3£ |

The expense mentioned for the operation conducted by a conveyancing solicitor is stated according to the rates of the Solicitors Remuneration Act of 1881. It was much greater before that time. And I must add also that the same costs applied only to transfers by sale. For transfers by donation, the cost under Lord Cairns' act could be reduced by three-quarters.

As to the expenses of the first registration — I mean of the entry of the title on the books — there was and could be no scale of prices under Lord Cairns' act. The cost depended on the length and difficulty of the inquiry pursued to ascertain the merits of the applicant's declaration. But it may be said that for a possessory title the cost was only half of that of an ordinary transfer; whereas for an absolute title it could reach a much higher sum. Nevertheless it was stated that for a property worth £40,000 the cost of an absolute title had only been £53, and for a property worth £700, £5 13s. In spite of all these advantages registration did not spread in the United Kingdom with satisfactory speed. More than one deficiency still remained to be removed. For instance, it was a fault to allow possessory titles to be registered without an exact description of the estate. I do not speak of the legal description existing in the proof of the ownership. This would have been superfluous for a possessory title. But I speak of the physical and geomet-

rical description, involving an exact and precise statement of the situation of the land and its boundaries. Without believing, though it seems to be true, that it often happened that a purchaser could not find the land he had bought, we may say that many owners could not say where their estate exactly began and ended. The boundaries were only described by the indication of the neighbors' names; but this could not suffice, and necessarily caused some litigation, not to speak of the risks of *inclosure* by one neighbor against another. But the registration acts were constrained by the absence of any accurate map of the land. The English do not have a tithe map like the French *cadaster*. Their best is the ordnance map kept in Southampton, and gradually brought up to date by the ordnance survey. One copy of that map is of one inch in the mile, another of five inches, and the best and last of twenty-five inches in the mile. But the marks of those maps can never be claimed as authentic boundaries of any property.

Besides this serious and still existing defect, the system of registration, as it was understood by the Westbury and Lord Cairns acts, had two other inconveniences with which the last act, of which we now have to speak, has fortunately been able to deal. One of these inconveniences was the absence of any compensation in case of eviction or error. And the other inconvenience

was to be found in the optional character of registration.

Registration can only be popular if it is admitted that the errors committed confer some right to compensation. But this principle, even when acknowledged, is susceptible of two different applications. It may be decided that any one who shall have been clever enough to get himself registered in regard to property belonging to another person shall, unless he be convicted of forgery, be deemed the real owner of the registered estate. Under such a system, the compensation funds are given to the man who has been deprived of his land by an error he could not prevent. We already know this system as the Australian, and it is true that the title registered with so complete an effect is an indefeasible one. But it may also be decided that registration will not, when the true owner comes to be known, be any hindrance to an honest claim, and that the man who has been obliged to surrender registered land will only receive pecuniary compensation. In this case registration is said to confer not an indefeasible title, but a guarantied one, the guaranty being in the fact that by registration one is sure to get, in the worst case, if not the land itself, its value in money.

This is the system enacted by the law of 1897, and we may consider it as providing a sufficient security for all land-owners to find great benefit in

registration. The seventh section of the act runs as follows: "When any error or omission is made in the register, or when any entry in the register is made or procured by or in pursuance of fraud or mistake, and the error, omission or entry is not capable of rectification under the principal act, any person suffering loss thereby shall be entitled to be indemnified in the manner in this act provided: Provided, that where a registered disposition would, if unregistered, be absolutely void, or where the effect of such error, omission or entry would be to deprive a person of land of which he is in possession, the register shall be rectified and the person suffering loss by the rectification shall be entitled to the indemnity."

For the purpose of providing the indemnity which may in such cases be payable, section 21 of the act provides that an insurance fund shall be raised by setting apart, every year, a variable portion of the receipts from fees taken in the Land Registry.

It is the Lord Chancellor and the Treasury who determine the portion to be raised. If ever the insurance fund were not sufficient the state would meet the deficiency.

It is to be added that these provisions for compensation have the merit of conciliating in some measure the sympathy of solicitors, for the legal profession may still help those who have their titles registered to draw them up in such a per-

fect or skilful way that the owner will be sure to remain in possession instead of being entitled to a mere indemnity.

Thus one of the principal deficiencies of Lord Cairns' act has been very cleverly done away with. I hasten to say that the Land Transfer Act of 1897 has also removed the inconvenience arising from the optional character of registration. To be quite true, it should be rather said that the new act has substituted for the option of individuals the option of counties. Registration has not been made compulsory throughout the whole kingdom. It is only enacted that, by order in council, the Queen may declare, "as respects any county or part of a county mentioned or defined in the order, that . . . registration of title is to be compulsory *on sale*." This last word requires notice. It shows that there always remains a new stage of progress to be reached. Even after an order in council, registration only becomes compulsory for *sale*, and all other kinds of transfer may remain unregistered.

Such, after forty years' growth, are the principles of registration in England. Let us now glance at its technical management.

There is only one registry for the whole of England; and it is to the chief of that office, called the registrar, that all those who want their titles registered must apply. He examines the titles

produced before him, and may, if not satisfied, require, before entering them on his books, such further proofs as he may deem useful. He may even require evidence from third persons, and ask the applicant to declare by an affidavit that he conceals no other important writing. The only case where he may neglect such information is where the applicant's possession is confirmed by limitation. As other warranties, it is enacted that any fraud shall expose its author to two years' imprisonment and a fine of £500, and moreover any person having an interest to do so is allowed to enter a caution in the registry against any registration concerning a definite property

Subject to these provisions an application may be made for the registration of a leasehold as well as of a freehold. But the copyholds remain under the special system we have already described. When he has got registered, the applicant may receive, simply on demand, a copy of his registered right. This copy receives the name, according to the case, of land certificate, office copy of a registered lease, or certificate of charge. As these copies are issued by the registry, they are no less authentic than the registers themselves, and it is easy for the owner to prove his right, to those with whom he may wish to contract, without sending them for information to the Land Registry. It is enacted that the certificate must be produced to the registrar on every "entry in the register of a dispo-

sition by the registered proprietor of the land or charge to which it relates, and on every registered transmission or certification of the register, and a note of every such entry, transmissiou or rectification shall be officially endorsed on the certificate."

And now, to have a full view of the mechanism of the system, we need only inquire about the way the different rights of property are entered on the registrar's books.

1st. *Transfers by sale.*— "The transfer is completed by the registrar entering on the register the transferee as proprietor of the land transferred," and "until such entry is made the transferror shall be deemed to remain proprietor of the land." (Act of 1895, sec. 29.) The same method is applied to freehold or leasehold land. (Same Act, sec. 34.) From that moment the transferee is entitled, if an eviction should take place, to the indemnity provided by the insurance fund. He therefore requires no other proof of the transferror's right than the fact that he was registered. The land certificate given by the transferror to the transferee mentions all the charges which weigh on the land, so that the transferee is aware of the rights that may be opposed to his. As, besides legal charges, landed properties are usually subject to traditional intricacies and other easements, it would be a complication for these intricacies to

be mentioned on every land certificate, especially owing to the fact of the considerable amount of litigation which could arise from any omission or misunderstanding about the least of these charges. The law has therefore wisely provided that, unless the contrary be expressed on the register, all registered land shall "be deemed to be subject to certain liabilities," of which the act of 1875 contains, in its eighteenth section, a complete list. Such are rights to mines and minerals, rights of fishing and sporting, rights of common, of sheepwalk, of way and water, as well as obligations to pay land taxes, tithe, rent charge, etc. I must say that in this list certain charges, such as the right of way and water, ought not to find a place. These easements are too important a burden, and their indefinite character is too variable from one property to another. They ought to be mentioned and defined on the register. French and Prussian legislation has taken this view, and after some time the English law will come to understand the matter in the same way.

2d. *Transfer by inheritance.*—There is an important difference between the case of a transfer by sale and that of a transfer by inheritance. It may be enacted that so long as a sale is not registered the purchaser acquires no right; but it would be hard to decide that a son should not inherit his father's property so long as it was not registered in his name. To whom would the prop-

erty belong in the meanwhile? It would be barbarous to have it confiscated by the state, and hardly less so to allow some collateral, relative or remote descendant to outstrip the very child of a deceased man in getting registered in his place. So the registration of titles acquired by inheritance remains optional, and may be postponed till the heir requires to sell or dismember his ancestor's estate. It is only decided that those who are entitled to any special charge on the inherited land may apply to the register to have it entered.

3d. *Mortgages.*—The mortgagee gets his title registered as though he had acquired the land by sale; but we already know that he receives, in place of the land certificate which remains in the hands of the mortgagor, another kind of copy called certificate of charge. As the mortgagee has the right to sell the land, the purchaser with whom he contracts requires a copy of his own. The registrar may deliver to him a new land certificate, notwithstanding the other copies which remain in the hands of both the mortgagee and the mortgagor. There is no inconvenience in the thing, as the mortgagor has only a certificate of charge, and as the mortgagee's land certificate bears the mention of the mortgage. It should be added that mortgages may be established as well without as with a power of sale. (Act of 1875, sec. 22.)

4th. *Liability to succession duty.*— It is enacted by the act of 1875, section 13, that "on every application to register land, the registrar shall inquire as to succession duty and estate duty," and "if it appears that the purchaser should be liable to the duty, notice of such liability shall be entered on the register." It is even enacted that a *bona fide* registered purchaser for full consideration in money or money's worth shall not be affected by the duty, unless so noted on the register.

We must add that a tenant for life may have his title registered, even if the reversioner or remainderman is not himself registered. (Act of 1897, sec. 6.)

The latest information shows that from twenty to thirty properties are being placed on the register every day, and that the financial conclusions have been very fairly verified, so that the registry pays its way easily, while no misfortunes whatever have occurred. This leads us to believe that expansion into the provinces will soon come. But up to this time the London county council has been alone in asking for an order of the crown making registration compulsory within its area. Outside of that county, registration depends on the land-owner's option, and this option has not yet been in its favor. It must be added that the rule of secrecy is subject to exception in the three ridings of the county of York, where a system of

registration established by Queen Anne has been renewed by two acts in 1884 and 1885. Two other exceptions are to be mentioned, in Kingston-upon-Hull and in Bedford Level. These exceptions deserve notice, inasmuch as they prove that the benefit of registration will break forth of itself even in the midst of the most contrary circumstances; and one may truly say that for England, as for so many other countries, the dawn of progress is following the night.

## LECTURE IV.

### THE FRENCH SYSTEM OF REGISTRATION.

French law has been, during a great part of this century, if not opposed to registration, at least strongly prejudiced against any compulsory system obliging owners to register their titles. Deeds alone are registered, and up to 1855 there was no provision for deeds of sale, but only for donations. Even since that time registration of deeds of sale is only practiced in a very imperfect way.

When the Civil Code was promulgated in 1804, it was enacted by its 1138th article that landed property should change hands by the simple and mere effect of contract. This was considered, on philosophical grounds, to be the triumph, the supreme victory, of the human will. A Frenchman felt proud to say that whereas, before the great revolution, all kinds of formalities were necessary to invest a stranger with private dominion on land, it henceforth needed nothing more than a simple agreement between two persons to accomplish a complete and reciprocal conversion of their respective ownerships. No better proof could be given of the power and might of a man's word than such a result. On social grounds there was

no less reason for pride. Those who remembered how many incumbrances had tied up land in former days, were full of joy at the thought that conveyancing could now be completed without any appeal to public or private authority. No kind of seizin was now to be requested. The lord of the manor and all feudal interferences had been abolished. "My will is the only measure of my power," said the proprietor, and all his fresh sense of humanity and its rights swelled within him as he spoke.

Such a feeling ought to have led to the understanding that if the human will was worthy to be completely free, it was quite as worthy to have its work protected against fraud or error, and such could only be the case if one were sure that the land, which now changed hands so easily, had not already, through that very facility, passed to another purchaser who would oppose his previous contract, as soon as the second purchaser should trouble him in his ownership. And how should such a risk be averted, if not by some formality which would enable any purchaser to publish his rights and so make it known that he would assert his own title as one to be preferred, not only to ulterior titles, but even to previous rights which had been kept secret. Such publishing could, as you understand, only be made by registration, so that in registration was to end the praiseworthy principle of freedom of contract. But registration

would have seemed, in those times, a kind of seizin by the state, succeeding to the seizin of the feudal lords, and too much prejudice would have been aroused against it for its benefits to have been understood and desired.

In fact registration existed, even then, for donations and for mortgages, but it was, as I have already said, a mere registration of deeds, conferring no indefeasible title and protecting mainly the registered owner or creditor from having his rights opposed by third persons.

**Donations.**— As to donations, the nine hundred and thirty-ninth article of the Civil Code obliges them to be registered before being opposed to any third person. The donor cannot avail himself of the defect of registration. He is tied by the contract he agreed to, and his heirs are tied as well. But any other person having received rights from the donor in the same thing can claim priority if he gets registered first.

Two reasons can be given for this maintenance of registration of donations. In the first place an historical reason. Registration appeared as a survival of the old formality of *insinuatio*, inherited from Roman law, and preserved through all the medieval changes. The force of custom had a great part in the embodiment of this special kind of registration in the Civil Code. But whereas *insinuatio* applied to movable as well as to im-

movable property, the Civil Code only obliged donations of land to be registered, because it is a principle that movable things are presumed to belong to him who is in possession. Concerning them the preferable purchaser will always be the one who has caused himself to be put into possession.

Besides this historical reason, there was a logical motive for requiring that a donee, who had gratuitously acquired land, should accomplish some special formality before being allowed to claim priority against a third person who might have spent money for his rights.

**Mortgages.**—The Civil Code also established registration for the real security called *hypotheques*. We have already mentioned this security under its English name; but the security itself is far different from the English mortgage, and it would be better to compare it to the security bearing the same Greek name of *hypotheques*, in Roman law. I speak of Roman law in its last period. The creditor entitled to an *hypotheque* is not in occupation of the land on which his security is settled. The debtor remains in possession, and while he remains so there may be any number of creditors secured by the same property. Each of them has, when his time to be paid comes, three definite and separate privileges. First, the privilege of seizing the security if the debtor does not pay

otherwise. The seizure leads to a sale by auction of the bailment, and the creditor is paid out of the cash produced by this compulsory sale. The second privilege of the creditors is the right to follow their security wherever it may have been transferred by the debtor. The debtor may have tried to make money out of it by selling it to a purchaser who has been imprudent enough to pay the price at once. In whosoever hands the land may be found, it remains subject to the *hypotheque*, and the creditor may seize it as readily as if the debtor were still in possession. The third privilege of the creditors entitled to an *hypotheque* consists in a right of priority for the creditors whose claim is first in rank. And it is precisely to secure this third privilege that the Civil Code established registration of deeds. It is clear that the worst confusion would arise if the right of priority could be claimed without any previous publicity. The subsequent creditors may consent to be preceded by him who first lent money to the debtor and received a title, but they must have been able to know, at the moment when they made the loan, that they would be preceded by a previous creditor. If not, it is to be feared that, by fraud, the debtor would obtain money from those who would have made no loan had they known their security not to be entire. In order to give to any one a clear knowledge of the risks to which he might be exposed for such reasons,

the Civil Code enacted that priority should be observed, not according to the date of each loan, but according to the date of registration. For that purpose, district registries were established, and as soon as an *hypotheque* had been given to any creditor he could hasten to have it entered in his district registry. He knew that, if a subsequent creditor was entered before him, he would only be second in rank, though his loan had been made first.

Donations and *hypotheques* were thus registered, but there was no registration for transfers by sale, nor for deeds relating to any other real right than the two we have just mentioned.

The consequences to which this absence of registration was to lead were the following:

(A) If a vendor mortgaged his property after having sold it, the purchaser's right, though not registered, remained opposable to the mortgagee, notwithstanding his right was registered.

(B) The mortgagee could only avail himself of having contracted with the vendor before the purchaser, if his mortgage had been registered before the contract of sale was passed. It might occur that the mortgagor would cheat the mortgagee by selling his property as soon as it was mortgaged. In such a case the mortgagee would be turned out from his right of priority, whilst the previous owner of the property got twice its value in money; first, by the loan obtained from

the mortgagee, and secondly, by the price paid by the purchaser. To prevent such a fraudulent speculation, it was decided by the *Code de Procedure Civile* some few years after the Civil Code had been enacted, and in the eight hundred and thirty-fourth article of that code, that certain, if not all, of the mortgagee's rights could be secured by registration within a fortnight after the fraudulent sale.

(C) When the same man had sold the same property to two different purchasers, the first contract passed was opposable to the second purchaser, in spite of his having had no means of ascertaining that the vendor was no longer master of the land when he contracted with him. It might happen that this effect of secrecy would enable a dishonest owner to sell his property several times and realize its value as many times, to the great prejudice of all the purchasers but one.

Such were the three main consequences of the absence of any kind of registration for a sale. It must be acknowledged that most of these inconveniences remained theoretical, and that tribunals and courts were not often called upon to investigate frauds of such a kind. But there always remained a risk of fraud against which all purchasers necessarily felt unprotected; and this risk was sufficient to produce social as well as legal inconveniences, since its least effect was certainly to prevent many useful contracts.

The want of a reform was therefore felt, but it got no satisfaction before the year 1855. In this year, on the 23d of March, a law was passed commonly called in France *Loi sur la transcription*, and which remains, up to now, the leading act in the matter of registration in France. Its principle is the following: Registers are established for the purpose of having entered any contract relating to land; but this principle, instead of being worked out in a general form and way, has only been embodied in a series of special and definite provisions, which, as we shall shortly see, fail to meet the complete purpose of registration.

The provisions of the law run as follows: Any *inter vivos* deeds by which real property changes hands are subject to registration. Such deeds may be contracts, or acts of recognition of adverse rights, or determinations at law. Equally subject to registration are: 1st. Any deed establishing rights of way or water, or any other easement or servitude, and any deed abolishing the same. 2d. Any lease for eighteen years or more. 3d. Any deed giving a receipt of three years' rent or more, when the receipt is given for rent which is not yet due. As long as such deeds are not registered, the rights they confer cannot be opposed to any third person who has acquired registered rights on the same land.

This very enumeration of the provisions of the law points out its deficiencies.

(A) In the first place, the law of 1855 only established registration of deeds and not registration of titles, and we already know that this distinction prevents the registered owner from obtaining an indefeasible right. He only acquires priority against third persons; but if the previous owner was not regularly in occupation, the purchaser may be turned out in spite of his being registered. This risk is far from being merely nominal or theoretical, for it may be shown, by several instances, that the loss of priority is not the only danger threatening purchasers. It may happen that the vendor had himself bought the land from a minor who acted without his guardian's leave, or from a married woman whose husband had not given the legal consent as required by French law, or from an insane person. In all these cases the vendor's title is subject to be annulled; and whereas such causes of nullity would not be opposable to a registered purchaser if registration conferred an indefeasible title, they are quite opposable in the French system.

(B) Another inconvenience comes from the fact that registration is not obligatory in France, and, as many owners are careless, blanks are to be found on the registers.

(C) A third inconvenience, perhaps the most serious, is caused by the absence of any sort of registration for some kinds of deeds. We have seen that the provisions of the law only spoke of

*inter vivos* acts. This excludes *wills*, so that in spite of his want of security a legatee cannot obtain registration. The French law considers that the effect of a legacy must be such that if, at any time, a will is discovered after the testator's death, this will must receive execution, and this demand would not be satisfied if, by any formality such as registration, one legatee could prevent the effect of a will not yet brought to light.

(D) Besides the fact that some deeds are not registered, other rights remain secret. Such are the legal mortgages created. without any document or agreement of the parties, in favor of married women on their husbands' property, or minors on that of their guardians; and these incumbrances can only be cleared off by means of a special procedure called "*purge.*" This procedure consists of an unconditional offer to all persons appearing to have claims on the estate.

All these are inconveniences of a judicial character. Others can be pointed out in the very way the registers are framed and kept. It is clear that as deeds and not titles are registered, there is no way to get, by investigation, an exact notion of the incumbrances bearing on a special piece of land. If you ask a French registrar to let you know if such or such an estate is free from all incumbrances, he cannot answer. To get an answer, you must speak to him, not of the land, but of the land-owner, and inquire about the

man's credit. He can then search for the deeds registered under that man's name. But there is no grouping of all the deeds relating to one estate, nor any index referring to them otherwise than by the owner's name. Not only do you remain ignorant as to the estate's legal position, but you are exposed to confusion as to the owner's identification. As the same proper name as that of the owner may be borne by several others on whose account deeds have been registered, confusion may arise between similar names, and this has been a cause of litigation in some cases.

All these inconveniences, and some others into the details of which I cannot enter to-day, have led French jurists to favor the introduction into France of the Torrens act more or less modified. For thirty years at least serious efforts have been made to that end. The movement began through newspaper articles published on the Australian system, and it was taken up by jurists as soon as a complete knowledge was obtained of the German and Austrian acts, which appeared to rely on the same principle as the Torrens system. Many valuable articles were then published in law reviews, and, invitations being issued, a congress was held at the Paris exhibition, in 1889, for that purpose; and another congress gathered with the same object in Paris in 1892. But the theoretical results of these two gatherings were paralyzed by the fact that a majority of members of the legal

profession joined them as subscribers and opposed all the proposals made by the promoters. So far as reasoning and argument were concerned, these members of the congress remained generally silent, feeling probably that no discourse could help their cause. But when the discussion was closed, and the congress came to votes, these obstructionists showed their spirit by their opposition, so that after long and enthusiastic reports and addresses in favor of registration, the only resolutions which could be carried were those offered against the scheme.

A far better work seems to have been done by the commissioners appointed to study the reform of the *cadaster*. This map, if accurate, would enable the land tax to be collected in a more equal way than to-day. As owners of land are assessed according to the *cadaster's* indications and estimations, it is clear that all errors in the map come to be errors in the assessment. But at the same time, the *cadaster* being the best way to identify the area and boundaries of small parcels of land, it is clear that its accuracy can enable precise statements to be made in the deeds intended to be converted into indefeasible titles. That is why and how the work undertaken by the commissioners with a fiscal end in view could be combined with the framing of a scheme for establishing land registries in France. This scheme will have to come before both houses of parliament before it

can be enacted. But the public expectation about it is considerable and deserves some notice.

According to this expectation, the land registries would be very similar to the German *Grundbuch.* The present system of registers, kept by the "keepers of mortgages" and having only references to the names of owners, and not to the land itself, would be done away with. In the new registers, each parcel of land would have its page or folium, and this folium would be divided into two parts. In the first part one could read the physical description of the soil with reference to the revised *cadaster*, and the indication of all incidental rights of way and water. In the second part would be entered the name of the owner and that of any party entitled to a reversion, mortgage, lien or other incumbrance on the same parcel. For convenience, it is admitted that when several contiguous parcels in the same parish belong to a single individual, a single folio may apply to all of them.

In order to appreciate to what extent such a scheme would substitute registration of title for the existing system of registration of deeds, we must inquire whether the three features of registration of title would be found under the new system; that is to say, if the titles would be indefeasible, if registration would be compulsory, and if there would be compensation for errors.

As to indefeasibility the question cannot be ex-

actly answered by yes or no. It does not seem likely that in old countries, where people have more regard for points of law than for economic considerations, the public mind would be prepared for a system preventing any rectification of the registers, as is the case in Australia. Theorists, therefore, propose provisions very similar to the Prussian law, according to which registers can be rectified as long as *bona fide* purchasers for value are not concerned by the rectification. But this principle itself would receive, in France, various modifications suggested by a minute analysis from the legal point of view. In some cases it may be fair to decide that rectification cannot take place at all if it is to concern third parties, even of an unqualified character; and in other cases that rectification can be opposed to any third parties, though they should be *bona fide* purchasers for value. Some examples are necessary to make this quite clear. Suppose that the rectification should find its legal basis in a right of action which might have been brought to the knowledge of third parties by notice on the register. If this notice has not been served, it is clear that third parties who have not been warned should not be ejected because of registration, even if they are neither *bona fide* purchasers nor purchasers for value. This would be the case if the registered owner were one who had acquired the land subject to certain conditions which he does not ful-

fill. The action of his vendor could have been made public from the moment the contract was made. If the terms of the contract have been kept secret, it would not be just to oppose them to third parties who were entitled to believe that the registered owner was not bound by any special condition or covenant for charge. A restriction would be made to the German principle in such a case. Suppose, on the contrary, that the registered owner has received the property as a gift from a person having no children. If the giver has a child born a few years later, the property must, according to French law, come back to him. It is a kind of legal and necessary reversion. But in the meanwhile the donee may have sold the land for a money consideration to a third person ignorant of these circumstances. The case of this third party is surely interesting, but not more so than that of the donor who did not foresee the birth of his child when he generously deprived himself of his property. To such a case it would be understood that the rectification should take place in spite of the third party's rights. But some theorists only admit that this effect should take place if there has been a caution lodged in the registry by the giver himself.

Subject to such modifications as these, titles will be made indefeasible in the German sense of the word. We come now to our second question, Would registration be made compulsory? The

answer is Yes. It seems to be proposed that, as soon as the registries shall have been established in one district, all agreements relating to land, as well as all devolution of land *mortis causa*, shall be required to be registered. But how would the registers be established in each district? It is proposed that, as soon as the *cadaster* has been revised in each district, the registrar himself should be ordered to draw up the registers. For this purpose he would send a private letter to all the owners whose names appear on the *cadaster* that they should send up their documents so that the folio concerning them might be drafted. Reasonable delay and notice would be given to all who might have objections to make, for bringing them forward.

A special feature of the French system would be that titles once registered would still remain for two years subject to the existing system, which only gives them a *possessory* character. This would give opportunity for the production of all objections before the titles should become indefeasible.

A *third* question remains to be answered. What compensation for mistakes would there be under the proposed system? It is not certain that there would be a special compensation fund, and we must acknowledge that, since rectification would be allowed whenever it would cause no injury to third parties, there would be much less reason

for compensation than under the Australian system. The principle accepted by most theorists is that errors should be paid for by the officials who have made the mistake. Ultimately the state would be held responsible if the officials were not solvent. But this cannot be passed without some objection from all those who believe that the state should never be declared responsible for what its agents and public servants have done. And this opinion would be supported by those who consider that the liability of the state would involve any amount of financial complications. But, perhaps, if the responsibility of the state were not admitted as a principle, a compensation fund might nevertheless be created by some amendment passed in parliament.

Two more remarks deserve to be made. In the first place, theorists do not consider that the registries ought to be kept *secret*. It is believed in France, on the contrary, that the registrar should answer all applications concerning the legal incumbrances charging any definite property. In the second place, it is admitted that *prescriptio* and *usucapio* ought to produce their legal effects against a registered owner who should happen not to be in occupation. This effect of adverse possession has already been stated as one of the features of the Austrian system, whereas it does not appear in Prussia nor in Australia.

To stand on existing ideas for introducing the

Torrens system into France, I may venture to say that in all countries legislation is a work of patience, and that some more years may elapse before the preceding proposals will be accepted. But, sooner or later, the substitution of absolute for possessory titles will certainly be realized in France.

## LECTURE V.

### OTHER COUNTRIES, AND GENERAL REVIEW OF THE SUBJECT.

**Tunis.**—We must add to the list of countries where registration of titles is established the small but prosperous regency of Tunis, on the North African coast. This regency submitted to the French protectorate soon after 1880, and in 1885, on the 5th of July, an act was passed in the French parliament granting Tunis a Land Registry. The manner in which titles are entered in this registry is somewhat different from that in Australia and in the German states. The applicant has to draw up three copies of his demand, and the recorder of titles, to whom he delivers them, sends one to the French district magistrate and one to the mussulman caid. These copies are given desirable publicity, and after three months' delay the property for which registration is sought has its boundaries controlled and ascertained by the French magistrate. This operation once concluded, the official report of the proceeding is published, and two months' more delay are awarded for objections, if any, to be presented. As soon as this time is passed, the local tribunal decides concerning the application before the recorder of

titles can enter it on his books. The local tribunal is formed by seven magistrates — three French, three native, and a French president; and one of the members is always appointed to act and stand for those who, because of absence or legal incapacity, cannot defend their rights.

When the tribunal has, after suitable investigation, allowed the applicant to be registered as owner of the property applied for, registration has the following effects:

1st. It is the only way to claim and secure a right in immovable property against third parties.

2d. Against a registered ownership no adverse claim whatever can prevail. If it happens that some one has, by mistake or for any other cause, suffered injury by undue registration, he can only, as under the Australian system, receive a money compensation. For that object a compensation fund is raised by a contribution of one per cent. on the value of the registered property. Any one held responsible for the error is also liable.

As to compulsion, it has not been deemed necessary, and every owner is free to apply or not for the benefits of the system.

**Canada.**— Another state in which registration of title has been introduced with success is Canada. The system was started there in Vancouver as early as 1861, and gradually extended to the greater part of the Dominion, beginning in British Colum-

bia in 1870, and passing, in a space of fifteen years more, to the Northwest territory. But though the principle of registration is alike in these different provinces, the practical application of the system differs from one province to another.

Mr. Brickdale, assistant registrar in London, compares the British Columbia system to that which was enacted in England by Lord Westbury's act in 1862, and prevailed there till Lord Cairns' act in 1875. The Ontario system is hardly less than a copy of this last English act, while the Northwestern system follows closely the Australian legislation. For this reason we may say nothing more of the Northwestern system than to refer to what has already been said (in our second lecture) about the Torrens acts, adding only that in the Canadian provinces the success of this registration has been as great as in Australia. This fact was brought out in 1893 at the Chicago Real Property Congress by Mr. Mason, manager of the Canada Permanent Loan and Savings Company, when he said: "The new system is now universally admitted to be a vast improvement of the old system."

As to the Ontario system, it is somewhat better than that of Lord Cairns, since it secures compensation for error, thus realizing the principal improvement which English legislation only obtained twenty-two years later. In Ontario the insurance fund is being raised by a contribution of one-fourth

per cent. Owing to this means of repairing mistakes, title is indefeasible, as it is in all states where errors are provided for, compensation and absolute title being the inseparable elements of registration. When these two elements meet it is easy to make legislation compulsory, and this is indeed the fact for all titles granted in Ontario since 1887, the date when the statutes of Ontario were revised. The registries in that province have no limited number; they may be multiplied wherever the municipal bodies guarantee the cost of establishing a new office.

The fees are moderate and hardly different from those adopted in other states. A first registration costs £1 ($5), including the price of the applicant's land certificate, but subject to such augmentation as may be justified by the examination of the title. As to subsequent transfers and mortgages, they cost no more than $2. British Columbia's system remains, as we have already ventured to say, rather beneath this standpoint. Registration is only understood there as conferring possessory title at first, and seven years' registration is required, after public notice, to have a possessory title converted into an absolute one. Though the security is less than in Ontario, the fees are rather higher, owing to the fact that besides the ordinary fee, which is only $1, there is an *ad valorem* duty of one-fifth per cent. on transfers and one-tenth per cent. on mortgages.

**Canton of Vaud.**— Last, but not least, among countries where absolute title is conferred on land, we must mention the small Canton of Vaud in Switzerland. This is indeed the only place in the world where one finds at the same time registration of titles and accurate *cadastral* plans both working for the better evidence of ownership in land. The system rests on two laws passed in the same year, 1882: one concerning real-property registration and the other the *cadaster*.

As in Germany, registration is compulsory; no right in land being transferable if the land is not first registered. As in Germany, also, occupation has no effect against a registered owner. But the German system is left behind by this small part of Switzerland on one point at least, since registration applies not only to ownership and mortgages, but also to easements, incidental rights and other servitudes which are not comprehended by registration in Germany.

There is no special fee for registration in the Canton of Vaud, the expense of the business being paid out of the *ad valorem* tax on sales of land. The registrar himself is paid out of that duty, and is held responsible for mistakes to those who suffer damage. This may occur in the same instances as in Germany, as it is likewise established that the registers cannot be rectified against *bona fide* purchasers for value.

**Belgium.**—We must give some attention to one or two minor states where registration of title to land has not been established, but where registration of deeds is practiced in a relatively perfect way. I point to Belgium and Scotland.

In Belgium the system of guarantying security of title was, up to 1851, the same as in France, owing to the enforcement of the *Code Napoleon* in that country at the beginning of the present century. But since an act of the 16th of December, 1852, most of the inconveniences pointed out in our lecture on the French system have disappeared from Belgium; and though registration of title has not been altogether established there, at least in the shape understood to be the best, it may be said that sufficient protection has been given to land-owners for them to be able to fear no ejectment.

In the first place, all transfers are executed before a public officer, the notary, who is responsible for the legal form and would be liable for any personal negligence. This notary keeps in his own office the original of the deed, so that the purchaser has no chance of losing it. If the notary's office happened to be burnt or blown up, there would be two ways of verifying the contents and statements of the deed: a proof could be obtained in the first place from the authenticated copy delivered by the notary to the purchaser, and, in the second place, from that other abstract of the title

which exists in the public treasury, where the deed is stamped on payment of the *ad valorem* duty. It must be remembered that these two guaranties, though often secured in France, are not always found there, because French law allows transfers to be executed by deeds under private seal as well as before a notary, and a deed under private seal has no original kept anywhere, not even at the public treasury, as the main object of acting under private seal is to escape the *ad valorem* duty.

Execution of deeds before a notary is the first essential feature of the Belgian system. Then comes the second, which is called "obligatory transcription of the deed in the keeper of mortgages office." When the document is transcribed a statement is made of the mortgages, if any, on the estate so transferred. The previous incumbrances are therefore known by the purchaser, who may ascertain under what responsibilities he acquires the land. And all incumbrances which have not yet been entered remain out of his way, as his own right on the land appears before theirs. We know that "transcription" exists likewise in the French system, but the protection is not the same, for the following reasons:

1st. Whereas the Belgian notary always transcribes the deeds executed under his care, most of the French deeds escape transcription when executed under private seal.

2d. Whereas the Belgian purchaser, when his title is transcribed, has no fear of any secret incumbrance on the land, the French purchaser may still be ejected by virtue of those legal mortgages which are opposable to him in spite of their not having been made public. It is a merit on the part of Belgium to have entirely done away with secret incumbrances.

We now come to the third feature of the Belgian system. Each township (commune) has its plan, describing the boundaries of each parcel, the area of the same, the annual value and other particulars; and as each citizen can claim an extract of the plan and refer to it in the deeds of transfer, the identification of land contracted about can be ascertained, if not completely, at least by close approximation. But here appears the principal deficiency of the Belgian system. The *cadaster*, however well kept up to date, is not a sufficient reference, and even when perfectly exact can only be a *reference* instead of being *evidence*, as would be necessary for titles of property to become truly absolute. Because of this deficiency it is true that the Belgian as well as the French system does not give notice of the credit of properties, but only of the credit of proprietors. The "keeper of mortgages," when applied to, can give no answer about the incumbrances charging such or such land; he can only answer questions concerning land-owners. He can tell you that a man

bearing such or such a name has four or five or even more creditors who have entered mortgages against him. One of these creditors may have a mortgage on one parcel only of the land, and another creditor may have a mortgage on another parcel. But as to the legal situation of the whole land, it requires personal calculation, if not guesswork, to know it. And it must be added that much confusion may arise, and does sometimes, from the occurrence of similar names. The keeper of mortgages, in answer to your inquiry, will give you the account of all inscriptions marked under the name you give him, and if this name is borne by several persons, you must make out for yourself which of the inscriptions mentioned concerns your own debtor.

Another inconvenience to be remembered is found in the fact that the books of the "keeper of mortgages" contain no information as to the causes of nullity which may affect the deed of transfer. The transferee who has ascertained that no third parties had better rights than his own, still remains ignorant as to the circumstances which may make the grant void.

These inconveniences have been so well understood in Belgium that within the last few years several lawyers of that country have declared themselves favorable to the establishment of a system of registration of titles.

**Scotland** is, as I have already said, only provided with registration of deeds, but this system has existed there for nearly three hundred years and has contributed to create a state of security hardly less perfect than if she were provided with absolute title. Since the institution in 1617 of the record book, which has the name of *register of seisins*, and up to 1868, every deed was entirely copied in the books, and though it was permitted, in 1868, to omit certain avoidable portions of the acts, the practice of the full copy is still kept up by most purchasers. It must be noticed that one of the principal inconveniences of the registration of deeds, "that is to say, the inconvenience arising from the fact that deeds are kept under the purchaser's name instead of being kept under the property's name," is not found in Scotland, at least since 1876. In that year an index table was established giving to each property a *search sheet*, on which are noted, in a concise way, references to every deed concerning that property. This reminds us of the German *Grundbuch* and its advantages, and prevents any confusion arising from similar names among land-owners.

Deeds alone, and not titles, being registered, it is clear that registration would confer no value upon a void deed. As the benefits of publicity are alone secured, no authentication is required by the registrar; but it seems that in Scotland authentication would be a superfluity, as deeds have been

registered for so long a time that it is possible for a purchaser to ascertain the vendor's right by a rapid inquiry in the registry.

And now that we have rapidly run over the systems of these minor countries, as we went over more important legislation in our preceding lectures, it is time to come to a conclusion on the general subject of registration. It seems to us that practical experience has proved that registration of title provides people with three universal and permanent benefits: security, simplicity, and economy.

**Security.**— Security is an unquestionable fact and may be considered on two sides. We find it provided for the registered owner who is protected against any kind of ejectment; and we find it provided for the rightful owner himself, who may be sure that no third party can register him out of his rights without compensation. These two results seem contradictory and impossible to be obtained simultaneously, and yet they are obtained by combining the two following principles: 1st, that registration can never be subject to rectification; 2d, that where a mistake has taken place, the person suffering injury is entitled to compensation out of public or private funds according to the fact of liability.

There is an exception to the first of these prin-

ciples in all other countries than Australia, when it is proved that registration has been obtained by fraud or by error; but this exception does not weaken in the least the warranty afforded by registration, since it has no effect on a *bona fide* purchaser for value. So whereas our first principle is by no means weakened, the second principle is strengthened, since in this particular case the rightful owner gets not only compensation in money, but recovers the very possession of his property.

In fact fraud has proved to be an unknown thing, or nearly so, in this matter, and errors have been very few. The only kind of frequent forgery which has been remarked took place in Austria at a time when husbands were induced to act as owners of their wives' property. But this fraud has come to be rare since special precautions have been adopted, namely, under the form of notices served by post, and sometimes personally on the grantor, so as to ascertain whether he is the same person who applied in the registry. Moreover, in some systems, any identification may be required by the registrar, and after this there is still an interval for objections. It is to these precautions, which vary according to countries, but appear everywhere, that security is due, so that the absence of fraud is to be attributed to the merits of the system quite as much as to the honesty of the applicants. Cases of error are and will always be

somewhat frequent, especially as regards the determination of boundaries. But statistics prove that this risk should not be exaggerated. Here are some typical instances to prove what I say:

(*a*) In New South Wales there were, in 1889, 209,894 registered dealings, and nevertheless the mistakes calling for repair only required a total compensation of £1,172, the average risk of error being only two and one-half cents for each registered dealing.

(*b*) In Queensland the risk of error was only one and one-half cents, the number of registered dealings being 233,309, and the compensation secured £1,500.

(*c*) In Tasmania and in Western Australia not a single farthing was paid for compensation during the whole time of operation.

**Simplicity.**— When compared with the practice of countries where conveyancing is still a private business, transfer under the registration system is of wonderful simplicity. Instead of applying to solicitors or to notaries, or to any other sort of business-men who require weeks and months before making the title clear, any man purchasing a registered property can save himself all other trouble than a simple call at the registry, where a few minutes search in the books shows him what right the vendor is really able to grant. After this the two parties need only agree upon a

notary to draw up the contract, which will serve as a document to be produced with the application for registration; and before a week is passed the notary may have done the work, and this may be signed and entered at once. Personal attendance at the registry is not even necessary, except in Prussia, and the applicant can rely on a third person if convenient to him, especially in countries where the registers are public and not private. The interference of a notary to draw up the contract can itself be dispensed with in many cases; as, for example, in Prussia, where conveyancing, being completed by two verbal declarations made before the registrar, requires no previous agreement. Where a deed is necessary, the same document usually contains the conveyance and the application for registration.

**Economy.**—Saving time and trouble is much; but saving money is still better in such a matter where a trade of land is concerned. Forms of civil law, whenever they are connected with commercial requirements, come to be necessarily governed by rules of political economy, of which economy itself is the first.

It would certainly be interesting to draw up a comparative scale of fees and prices concerning registration of conveyances and of incumbrances in various countries. My attempt to draw up this scale failed to be successful, owing to the great

differences in the management of duties between one country and another. In Switzerland, for instance, the expenses are almost impossible to estimate, as the cost of registration is included in the duty on sales, and the registration is paid partly by a percentage on that duty. In Austria fees vary according to the recency of the preceding operation. Elsewhere fees are only part of the costs, because one must add to the *ad valorem* duty taxes for searches, or for perusing documents on examination of title as well as for noting the transaction on the books or on the land certificate or on the certificate of charge, according to the case. But we may say, in a general way, that after having added up all the different charges existing in the country where registration expenses are highest, we still remain far beneath the costs to be undergone where registration does not exist. To take an instance, we might compare fees in Prussia with those in England. The fees would be in England, even where an abatement has been made,

For 100 dollars..... 10 dollars.
2,500 dollars..... 30 dollars.
5,000 dollars..... 50 dollars.
50,000 dollars.....350 dollars.

whereas in Prussia they would only be

For 100 dollars..... 1 dollar and 33 cents.
2,500 dollars..... 8 dollars and 2 cents.
5,000 dollars.....15 dollars.
50,000 dollars.....75 dollars.

All the previous statements verified by experience leave little ground for objections raised

against registration of title, such as those, for instance, which were made at the World's Real Property Congress in 1893. These, if I have well understood them, were mainly the following:

1st. Registration would be unjust because of the risk rightful owners might incur from the registrar's mistake.

2d. The absence of legal protection for incidental rights, such as easements, settlements, vendors' liens or adverse possession.

3d. The failure of registration of title in England.

As to this last objection I scarcely need to reply, as the World's Congress, where it was heard, was followed four years later by the enactment in England of that very satisfactory "Land Transfer Act" whose provisions and practical advantages were recorded in our third lecture.

Little also remains to be said about the other two objections, as they are refuted by experience. It is certainly true that easements require legal protection and that they must be accounted for under any system of transfer of land. But there is no difficulty in their being recorded under a system of registration of title; and if they fail to be recorded in Prussia, we have seen that it is only because they are looked upon as being unimportant charges on real property. But we know that in Austria and Hungary all easements and servitudes are registered, and there is no reason to pre-

vent their registration being made compulsory wherever it still fails to be. We also know that life estates, estates in remainder and settlements appear on most registers, and can be made to appear where they are not yet provided for. Theoretically and practically all these incidental rights are no more difficult to register than a simple mortgage, and it is impossible to say, because in one or another country they have been overlooked, that registration cannot secure the protection of such rights.

The only objection which may remain rooted in certain minds is that of the injustice of registration, because this objection being of a sentimental character is beyond any kind of reasoning. But it is not true that registration cannot be accepted, both as a principle and as a fact, by those who are most attached to the principles of equity and right, and all the promoters of registration certainly deserve to be numbered as such. Since registration before taking place is preceded by a severe examination of titles by serving notices on all those who are connected with the land, and by advertisements in public papers, who can doubt that all risks of error, and therefore of injustice, are removed? We do know that some mistakes have been made; but we also know how very few of these have been made. Forgery on one side, and negligence on the other, may still combine in some cases to deprive a rightful owner of his prop-

erty; but is it not clear that such a risk cannot be compared to the risk which, under the system of no registration at all, threatens all those who carelessly enter into rash agreements?

To speak the truth, there is only one real hindrance which prevents registration from spreading over the whole world, and that is neither its injustice nor its theoretical or practical deficiencies; it is simply the obstruction of it by the legal profession. Solicitors, and all those who share in the costs of private conveyancing, find it all the better that the prices are high and the intricacies more complicated. Their objection to registration is really based on their fear of its advantages much more than of its deficiencies. But however great may be the desire of all those connected with the legal profession to secure their pecuniary interests rather than the owner's rights, it is clear that the interests of the community at large must in the end be preferred to private interests, however worthy these may be. This was already clearly understood at the World's Real Estate Congress in 1893, when the following resolution was carried with only two dissenting voices: "That it is the sense of the delegates of the World's Real Estate Congress that they should do what lies in their power to call the attention of their various state legislatures to the benefit of the Torrens system, and recommend its adoption, so modified as to suit it to their state constitution and laws."

This resolution, drafted and carried by prominent lawyers sitting in a scientific congress, and after full consideration of the subject, has not ceased to deserve approbation; and coming from a source so much more authoritative than myself, its value will perhaps not be impaired if I venture to quote it as the best conclusion I can find for my lectures.

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